

Galindo v. Ashcroft, No. 02-73255

DEC 17 2003

THOMAS, Circuit Judge, concurring:

CATHY A. CATTERSON  
U.S. COURT OF APPEALS

I agree that the petition for review should be denied, but for a different reason. The petitioner in this case did not file a timely petition for review from the BIA decision on the merits. This appeal is only from the BIA's denial of the motion to reopen. Thus, our review is confined to that decision and the grounds on which the BIA based its denial of the motion to reopen. Mendez-Gutierrez v. Ashcroft, 340 F.3d 865, 869 (9th Cir. 2003) (citing Martinez-Zelaya v. INS, 841 F.2d 294, 296 (9th Cir. 1988)).

The BIA denied petitioner's motion to reopen for the following reasons:

The respondent moves the Board pursuant to 8 C.F.R. § 3.2 to reopen our decision dated June 14, 2002. The thrust of the respondent's motion is that the board sent a copy of the final order in this matter to an old address of the respondent's counsel. According to the respondent, this caused prejudice and caused him to lose "valuable appellate rights," without specifying either the prejudice or what rights were lost. *The only possible prejudice to the respondent could have been a lack of time to prepare for voluntary departure.* However, the respondent's own submissions indicate that this period was extended until August 14, 2002. Accordingly, the motion is denied. (emphasis added).

The italicized language indicates that the BIA did not engage in any review of whether petitioner was prejudiced by losing her rights to appeal to *this* Court. It *only* looked at the issue of whether petitioner was prejudiced by a delay in preparing for voluntary departure. In other words, the BIA did not interpret the

motion to reopen as a mechanism for reinstating the right to appeal to this Court. This makes sense, as it would be odd for the BIA to determine whether loss of appeal rights to this Court prejudiced petitioner: The reason a petitioner would need appeal rights is to get another decision making body to review the BIA's decision, not to induce the BIA to review its own decision.

In sum, I believe the BIA interpreted the motion to reopen correctly and correctly found no prejudice to petitioner's preparation for voluntary departure. For that reason, I agree that the petition for review should be denied. I would not reach the merits of the original BIA decision.